Supreme Court, U.S.
FILED
JUL 2 2 2009
OFFICE OF THE CLERK

No. 08-1360

In the Supreme Court of the United States

SAMUEL CLAYTON, JR., M.D.,
Petitioner

v.

PENNSYLVANIA DEPARTMENT OF WELFARE, by and through their Agent, ESTELLE RICHMAN, Secretary, Department of Public Welfare; HARRISBURG STATE HOSPITAL, by and through their agent, DR. ANN SHEMO, Medical Director, PA Department of Public Welfare, Harrisburg State Hospital,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS W. CORBETT, JR.
Attorney General

HOWARD G. HOPKIRK
Senior Deputy Attorney General
Counsel of Record

CALVIN R. KOONS
Senior Deputy Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General

Office of Attorney General
Appellate Lit. Section
Com. of Pennsylvania
15th Floor, Strawberry Sq.
Harrisburg, PA 17120
(717) 783-1478

QUESTION PRESENTED

Whether a "GVR" (Grant/Vacate/Remand) Order should be issued to allow the Court of Appeals to reconsider its decision under the Lilly Ledbetter Fair Pay Act of 2009 where the Court of Appeals held that regardless of petitioner's failure to exhaust, there was no evidence to support a claim of racial discrimination under Title VII?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

There is an alternative basis for affirmance which makes vacating the judgment of the Court of Appeals unnecessary and a waste of judicial resources.

CONCLUSION 8

TABLE OF AUTHORITIES

Cases **Page**

Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007) 1, 3, 5, 6

Statutes

42 U.S.C. §1981 2
42 U.S.C. § 2000e-5(d)(3)(A) (as amended by Lilly Ledbetter Fair Pay Act of 2009) 1, 5, 6
43 P.S. §§ 951, *et seq.* 2

STATEMENT OF THE CASE

This case involves multiple claims of racial discrimination brought pursuant to Title VII. The Court of Appeals affirmed the District Court's decision that petitioner's claims (relating to pay for on-call time) were barred for failure to exhaust under this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). Congress has now enacted the Lilly Ledbetter Fair Pay Act of 2009 to make each time compensation is paid a new and separate unlawful employment practice. The question presented is whether the Court should vacate the decision of the Court of Appeals and remand the case for reconsideration in light of the Lilly Ledbetter Fair Pay Act of 2009.

1. Petitioner is an African-American physician who was employed part-time at Harrisburg State Hospital (HSH) from 1985 until his retirement on September 26, 2003. Pet. App. at 4a-5a. Respondents are the Pennsylvania Department of Public Welfare (DPW); Estelle Richman, Secretary of DPW; and Dr. Ann Shemo, Medical Director of HSH. *Id.* Since at least the mid 1980's, on-call time was prorated based on the number of hours worked by HSH physicians. *Id.* at 35a-36a. For a brief period of time between August and October of 1999, on-call time was equalized between full-time and part-time physicians. *Id.* at 36a. However, due to objections from the physician's union, the prior policy of prorating on-call time based on whether a physician was full or part-time was reinstated. *Id.*

Under the policy, petitioner was given less on-call time than full-time physicians from October of 1999 until his retirement. *Id.* Dr. Davis, a white part-time physician at HSH, was also never given on-call time equal to that of full-time physicians. *Id.* There is no evidence in the record that other part-time physicians were treated differently from petitioner under HSH's policy for on-call time. *Id.* at 50a-51a. Petitioner also failed to present evidence showing that the policy was "directed at him based upon his race." *Id.* at 62a.

2. On February 13, 2001, petitioner filed a complaint with the Pennsylvania Human Relations Commission. *Id.* at 5a. On March 6, 2001, petitioner filed an amended complaint with the EEOC in which he alleged for the first time that he had been discriminated against under HSH's policy for on-call time. *Id.* The EEOC issued a right to sue letter on January 13, 2005. *Id.*

Petitioner commenced the present action by filing a complaint in the District Court on April 15, 2005. *Id.* at 31a. In his amended complaint, petitioner alleged that he had been subjected to racial discrimination while a physician at HSH in violation of 42 U.S.C. §1981; Title VII, and the Pennsylvania Human Relations Act, 43 P.S. §§ 951, *et. seq.* Pet. App. at 31a. In addition to his claims regarding on-call time, petitioner alleged numerous other acts of discrimination including, *inter alia*, threat of being furloughed, change in work schedule, undesirable office assignment, relocation of mailbox, removal of desk from office, and denial of bonus for obtaining Board Certification. *Id.* at 35a-39a. Petitioner further claimed that the individual acts of discrimination against him were so pervasive that

they amounted to a hostile work environment and that as a result he was constructively discharged from his job. *Id.* at 58a-61a.

The District Court granted summary judgment in favor of respondents on all claims on February 20, 2007. *Id.* at 31a-69a. In reaching its decision, the District Court found that petitioner's claims relating to on-call time were barred by the statute of limitations since the claims would have accrued at the latest in October of 1999 (when HSH reinstated its policy of giving preference for on-call time to full-time physicians) and he did not file his EEOC complaint until 2001. *Id.* at 62a-65a. However, prior to reaching this conclusion, the District Court made a determination on the merits that petitioner could not make out a *prima facie* case of discrimination for his on-call time claim since he produced no evidence that similarly situated members of other racial classes were treated more favorably than he was. *Id.* at 50a-51a. The District Court specifically found that "a review of the facts indicates that [petitioner's] failure to receive on-call time equal to a full-time physician was not based upon racial discrimination, but was due to [petitioner's] status as a part-time physician." *Id.* at 51a. The District Court denied petitioner's motion for reconsideration on June 18, 2007. *Id.* at 13a-29a.

3. In the Court of Appeals, petitioner argued, *inter alia*, that the district court erred in finding that his claims regarding on-call time were time barred. *Id.* at 7a-8a. Petitioner maintained that the HSH's policy regarding on-call time should be construed to be a continuing violation which did not accrue until his retirement in 2003. *Id.* at 8a. Relying on this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,

Inc., 550 U.S. 618 (2007), the Court of Appeals rejected petitioner's position and held that a new violation did not occur under Title VII each time petitioner received a paycheck. Pet. App. at 8a-9a. Accordingly, it agreed with the District Court that petitioner's claims regarding the allocation of on-call time were time barred. *Id.*

However, the Court of Appeals further held that "[p]etitioner is unable to prove that he was subjected to a discriminatory or retaliatory employment action through [the denial of on-call time or any of the other] individual incidents recounted in his claim." *Id.* at 10a. The Court of Appeals specifically concluded that "[t]he record has nine alleged incidents of discrimination spread over a five-year period. None of these incidents was severe or pervasive in nature and none was shown by [petitioner] to have been racially motivated." Pet. App. at 10a-11a. Petitioner filed a petition for rehearing *en banc* which was denied by the Court of Appeals on February 3, 2009. *Id.* at 2a.

REASONS FOR DENYING THE WRIT

There is an alternative basis for affirmance which makes vacating the judgment of the Court of Appeals unnecessary and a waste of judicial resources.

The Court of Appeals relied on *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), in determining that petitioner's claims regarding the denial of on-call time were barred by the statute of limitations. Pet. App. at 8a-9a. However, Congress enacted the Lilly Ledbetter Fair Pay Act of 2009 on January 29, 2009. The Act provides in relevant part that an unlawful employment practice occurs under Title VII "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." Pet. at 3 (quoting 42 U.S.C. § 2000e-5(d)(3)(A)).

Since the Act is retroactive, petitioner argues that its passage has changed the legal standard relied upon by the Court of Appeals in reaching its decision in this case. Pet. at 8. Respondents concede that the Act has expressly abrogated this Court's decision in *Ledbetter* and that to the extent the Court of Appeals relied on the decision in *Ledbetter*, it is now in direct conflict with the Act. Furthermore, if the decision of the Court of Appeals was based solely on the determination that petitioner's claims regarding on-call time were time barred, it would be appropriate to remand the case for the Court of Appeals to reconsider its decision.

However, it is unnecessary to vacate the judgment of the Court of Appeals in this case because the lower courts fully considered petitioner's claims on the merits. The District Court, in a lengthy and detailed decision, found that petitioner could not make out a *prima facie* case of discrimination on his claim regarding on-call time since there was no evidence which would show that similarly situated members of other racial classes were treated more favorably than he was. Pet. App. at 50a-51a. It further determined that the record established that the amount of on-call time petitioner received was not based on racial discrimination but was the result of him being a part-time physician. *Id.* Likewise, the Court of Appeals determined that petitioner was unable to prove that he was subjected to racial discrimination. *Id.* at 10a. Moreover, the Court of Appeals expressly stated that there was no evidence that any of the nine alleged incidents of discrimination which occurred between 1998 and 2003 were racially motivated.[1] *Id.* at 10a-11a.

The District Court and the Court of Appeals determined that petitioner's claims regarding on-call time were barred by the statute of limitations under *Ledbetter*. Given the passage of the Lilly Ledbetter Fair Pay Act of 2009, it would have been appropriate to grant a GVR order if the lower courts had not already fully considered petitioner's claims on the merits. The Court of Appeals has already determined that respondents were entitled to summary judgment because petitioner did not establish his *prima facie*

---

[1] On-call time was the first of the nine individual incidents of discrimination which were specifically enumerated by both the District Court and the Court of Appeals.

case. Pet. App. at 10a. This constitutes an alternative and completely sufficient basis for affirming the judgment of the District Court. Accordingly, vacating the decision of the Court of Appeals and remanding the case for further consideration is unnecessary and would be a waste of judicial resources under the facts of this case.

CONCLUSION

For these reasons, respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

THOMAS W. CORBETT, JR.
Attorney General

HOWARD G. HOPKIRK
Senior Deputy Attorney General
Counsel of Record

CALVIN R. KOONS
Senior Deputy Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General

COUNSEL FOR RESPONDENTS

Office of Attorney General
Appellate Litigation Section
Commonwealth of Pennsylvania
15th Floor, Strawberry Square
Harrisburg, PA 17102
(717) 783-1478

DATE: July 22, 2009